No. 80-2178

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

AND

UNIVERSITY OF MARYLAND,

Petitioners,

V.

JUAN CARLOS MORENO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Are nonimmigrant aliens a suspect class for whom strict scrutiny equal protection analysis should be applied to invalidate the rationally-based tuition and fee policies of public colleges and universities?

2. Does an automatic violation of the supremacy clause follow from a denial of equal protection to nonimmigrant aliens in the granting of "in-state" benefits?

3. Did the lower courts fail to give proper effect to *Toll v. Moreno*, 441 U.S. 458 (1979), and to other decisions of this Court when they concluded that the University of Maryland's policy created an irrebuttable presumption violative of due process until June 23, 1978?

4. Should *Vlandis v. Kline*, 412 U.S. 441 (1973), be overruled?

5. Is the eleventh amendment a bar to the retroactive tuition refunds that the lower courts ordered on the premise that they could reaffirm the district court's order of July 13, 1976, which this Court's decision in *Toll v. Moreno*, 441 U.S. 458 (1979), had effectively vacated?

PARTIES

The parties to the proceeding in the court of appeals were John S. Toll, President, University of Maryland, and the University of Maryland, as the appellants; and Juan Carlos Moreno, Juan Pablo Otero, Clare B. Hogg, and Renee Otero, Jr., as the appellees.

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BRIEF OF PETITIONERS

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), and

is reprinted in the appendix to the petition for writ of certiorari (P.A. 1a).[1] The opinions of the United States District Court for the District of Maryland that occasioned the appeal are reported as *Moreno v. Toll*, 480 F. Supp. 1116 (D. Md. 1979), and *Moreno v. Toll*, 489 F. Supp. 658 (D. Md. 1980). (P.A. 11a and 29a).

This litigation has produced a number of additional opinions, including two of this Court. The first opinion of the district court is reported as *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976), and is reprinted in the appendix to the petition for writ of certiorari (P.A. 55a). While the affirmance of this decision is reported as *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977), the per curiam opinion of the court of appeals was not reported and is reprinted in the appendix to the petition for writ of certiorari (P.A. 101a). After granting certiorari, *Elkins v. Moreno*, 434 U.S. 888 (1977), this Court, after briefing and argument, issued its first opinion, *Elkins v. Moreno*, 435 U.S. 647 (1978) (P.A. 105a), certifying a question of state law to the Court of Appeals of Maryland. The opinion of the Maryland court is reported as *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979) (P.A. 137a). This Court's second opinion, reported as *Toll v. Moreno*, 441 U.S. 458 (1979) (P.A. 157a), vacated the judgment of the United States Court of Appeals for the Fourth Circuit and remanded the case to the United States District Court for the District of Maryland for further consideration.

JURISDICTION

The jurisdiction of this Court is premised upon 28 U.S.C. § 1254(1) (1976). The judgment of the court of appeals was entered on March 26, 1981. A petition for writ of certiorari

[1] References to the appendix to the petition for writ of certiorari are cited as "P.A." and references to the joint appendix as "J.A."

was filed on June 24, 1981, within the 90 day period provided by 28 U.S.C. § 2101 and Rule 20 of this Court, and was granted on October 5, 1981.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States

Article I, section 8. clause 4:

> The Congress shall have Power . . . To establish an uniform Rule of Naturalization.

Article VI, clause 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XIV, section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

Title 8, section 1101(a)(15) (1976) is reprinted in the appendix to the petition for writ of certiorari. (P.A. 162a).

University of Maryland Policies

The policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes is reprinted in the appendix to the petition for writ of certiorari. (P.A. 167a).

A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar As It Denies In-State Status to Nonimmigrant Aliens is reprinted in the appendix to the petition for writ of certiorari. (P.A. 172a).

STATEMENT OF THE CASE

A. The University's In-State Policy and Its Purposes

Most public institutions of higher education in the United States, including the University of Maryland, charge lower tuition rates and fees to "in-state" or "resident" students. For *eligible* classes of students, domicile is the key to in-state or resident status.[2] A number of groups of students, including citizens, however, are excluded without reference to their domicile. At the Uni-

[2] The in-state policy of the University of Maryland, reprinted in the appendix to the petition for writ of certiorari (P.A. 167a), lists a number of non-exclusive indicia of domicile that are used to determine a student's status. These include presence, possession of personal and real property, motor vehicle registration, driver's license, voting, and income tax payments. If the student is financially dependent on a parent or spouse, the status of the parent or spouse rather than of the student is looked to in making the determination.

versity of Maryland, for example, the in-state policy denies benefits to members of the Armed Forces who are assigned by the military to attend the institution for educational purposes. Also excluded are students who are financially dependent on parents or a spouse not domiciled in the State. The student's domicile is also ignored by the University of Maryland where nonimmigrant aliens are involved.[3] In a policy common to most public colleges and universities in the nation, the University's in-state rules provide that only United States citizens and "immigrant aliens lawfully admitted for permanent residence" are eligible for in-state benefits.[4]

[3] As defined by the immigration law, 8 U.S.C. § 1101(a)(15) (1976) (P.A. 162a.), there are twelve general categories of nonimmigrants: ambassadors and diplomats and their families (A-visa); temporary visitors for business or pleasure (B-visa); aliens in transit (C-visa); alien crewmen (D-visa); traders and investors (E-visa); foreign students (F-visa); officers and employees of and representatives to international organizations (G-visa); temporary workers (H-visa); foreign journalists (I-visa); exchange visitors (J-visa); fiancees or fiances of U.S. Citizens (K-visa); and intra-company transfers (L-visa).

Nonimmigrant aliens "do not share all the burdens that are imposed on residents of the country." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312-13. They are not like resident aliens. Resident aliens, like citizens, "serve in the Armed Forces and were subject to conscription under the selective service laws. They pay taxes precisely like citizens of the United States. They enjoy no immunity from state or federal criminal law [and] enter the United States with the intention of making this country their home." Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?* 75 Mich. L. Rev. 1092, 1110-11 (1977).

On the basis of alien address reports, as of January 1977, there were 58,035 permanent resident aliens and 8,391 nonimmigrants in Maryland. *1977 Annual Report: Immigration and Naturalization Service* at 108.

[4] The only evidence below, an affidavit of a University of Maryland admissions director (J.A. 53A-54A), attests to the fact that the University's policy as to nonimmigrants is in accord with that of most other public colleges and universities. Comprehensive surveys conducted by the staff of the University of Maryland and the Attorney General's office in 1976 and 1981,

By its terms and operation, the University of Maryland's in-state policy benefits many aliens. In the fall of 1979, for example, there were 1255 permanent resident aliens registered at the three principal undergraduate campuses of the University, and nearly 1000 of these were in-state students subject to lower tuition and fee rates. By contrast, only 493 nonimmigrants, classified as out-of-state students, were registered at that time (J.A. 52A-53A).

Before and throughout this litigation, a number of reasons surfaced in justification of the University's treatment of nonimmigrant aliens. For example, attached to the international bank students' district court complaint were a number of communications to them from University officials explaining the reasons for denying them in-state status (J.A. 15A-19A). Illustrative is this excerpt from a March 19, 1975, letter from then-University President Elkins, in which he concurred in the Intercampus Review Committee's decision to deny in-state status to respondents Moreno and Otero (J.A. 15A):

> It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. This classification policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not. In reviewing these cases, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Mr. Moreno and Mr. Otero as "out-of-state."

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as well as the participation of nearly all of the States of the Union as amici curiae in this case, indicate the widespread policy of excluding nonimmigrants fron in-state benefits.

> The University's classification policy also distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, it is my opinion, and the position of the University, that the terms and conditions of a G-4 nonimmigrant visa preclude establishing the requisite intent necessary for Maryland domicile. Thus, because Mr. Moreno and Mr. Otero are not domiciliaries of Maryland, and because of the underlying principle of cost equalization, I am denying the requests for reclassification.[5]

See also letter from Judith L. Hirsch, corresponding secretary of the Intercampus Review Committee, dated February 24, 1975 (J.A. 16A); letter from Assistant Director of Admissions George E. Raley, Jr., dated April 3, 1975 (J.A. 17A); letter from President Wilson H. Elkins, dated May 14, 1975 (J.A. 18A). These documents, submitted by the international bank students, are the only ones that evidence the purposes of the in-state policy prior to the filing of this action.[6]

[5] The second reason stated in President Elkins' letter, to the extent it suggests that G-4 aliens cannot be domiciled in Maryland under common law principles, has been found to be based on an erroneous view of federal and state law. Elkins v. Moreno, 435 U.S. 647 (1978); Toll v. Moreno, 284 Md. 425, 397 A.2d 1009 (1979). Nevertheless, the University has asserted the first interest, *i.e.*, cost equalization, in every brief filed in this case, including the brief submitted to this Court in 1977. Brief of Petitioner, Elkins v. Moreno, 435 U.S. 647 (1978), at 31-32. And, in 1976, the lower court itself expressly held that cost equalization as a rationale could *never* justify the in-state policy against a due process challenge, Moreno v. University of Maryland, 420 F. Supp. 541, 560 (D. Md. 1976), a position which the court implicitly reversed in 1979 when it held the policy valid on due process grounds after June 1978. Moreno v. Toll, 480 F. Supp. 1116, 1125 (D. Md. 1979).

[6] The in-state policy was approved by the Board of Regents of the University of Maryland on September 21, 1973. It was drafted following the decision in Vlandis v. Kline, 412 U.S. 441 (1973), and in light of the fact that in every major case where an in-state policy had been challenged on constitutional grounds, institutions had sought to justify it on cost-equalization grounds. Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970) *aff'd*, 401 U.S. 985 (1971) (*mem.*); Kirk v. Board of Regents of University

In June 1978, the Board of Regents of the University of Maryland, echoing language in the 1975 letters from University officials that has been emphasized in this case since at least 1976, issued a clarifying resolution declaring in pertinent part that the in-state policy (P.A. 173a-74a):

> insofar as it denies in-state status to nonimmigrant aliens, serves a number of substantial purposes and interests, whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law, including but not limited to:
>
> > (a) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;
> >
> > (b) achieving equalization between the affected classes of the expenses of providing educational services;
> >
> > (c) efficiently administering the University's in-state determination and appeals process; and
> >
> > (d) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials.

The language of the policy was not altered by the clarifying resolution and the policy has never been amended. Similarly, neither its operation nor its effect on nonimmigrants has been changed. Before the June 1978 resolution, nonimmigrants were denied in-state benefits; the same has been true after the date of the resolution.

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of California, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970); Sturgis v. State of Washington, 368 F. Supp. 38 (W.D. Wash.), *aff'd*, 414 U.S. 1057 (1973) (*mem.*)

B. History of the Proceedings Prior to Remand

On May 27, 1975, three of the named respondents, nonimmigrant aliens holding G-4 visas[7] and children of employees of certain international banks based in Washington, D.C., who were then undergraduate students at the University of Maryland, brought a class action suit in the United States District Court for the District of Maryland against the University of Maryland and its then-President, Dr. Wilson H. Elkins (J.A. 6A). The respondents challenged the constitutionality of the University's policy of granting admission on a preferential basis and charging lower tuition and fees to in-state students. Alleging jurisdiction under 28 U.S.C. §§ 1343(3) & (4) (1976), the international bank students contended that by excluding nonimmigrants from in-state benefits, the policy created an irrebuttable presumption of nondomicile in violation of due process and denied them equal protection of the laws by discriminating against them because of their alienage.

On cross motions for summary judgment, the district court held on July 13, 1976, that the in-state policy as applied to G-4 aliens violated due process and enjoined its enforcement (P.A. 55a). *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976). The court did not decide

[7] G-4 aliens are a group of nonimmigrants comprised of "officers or employees of international organizations and the members of their immediate families." 8 U.S.C. § 1101(a)(15)(G)(iv)(1976). The respondents' fathers were employed by the Inter-American Development Bank (IDB) and the International Bank for Reconstruction and Development (World Bank). Under federal law, employees of the IDB and the World Bank who hold G-4 visas are the beneficiaries of various privileges and immunities, including exemption from federal and state income tax levies. Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 502, Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397; 22 U.S.C. § 288(d)(1976); 26 U.S.C. § 893(a)(1976).

the students' equal protection claim or the contentions they raised in legal memoranda that the in-state policy interfered with the G-4's treaty tax exemption and constituted a regulation of immigration in violation of the supremacy clause (P.A. 89a). 420 F. Supp. at 560. On August 3, 1976, the court stayed the injunctive portions of its order on the condition that the University refund tuition and fee differentials to eligible G-4 students in the event the July 13, 1976, order "were finally affirmed on appeal" (P.A. 100a).

The United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court on April 27, 1977, in a one-paragraph, unpublished per curiam opinion (P.A. 101a). *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977). The appellate court later stayed its mandate "on the same terms as the district court namely that should the appellant's petition for writ of certiorari prove unsuccessful, then those members of appellees' class who timely filed requests for reclassification to 'in-state' status would receive a refund of excess fees paid during the pendency of the stay" (P.A. 103a-104a).

On October 11, 1977, this Court granted a petition for writ of certiorari to consider whether, in light of *Weinberger v. Salfi*, 422 U.S. 749 (1975), the University's policy created an irrebuttable presumption. *Elkins v. Moreno*, 434 U.S. 888 (1977). Following argument, the Court (with two dissents) sua sponte ordered certified to the Court of Appeals of Maryland the question of whether G-4 aliens can become Maryland domiciliaries (P.A. 105a, 118a, 124a-25a). *Elkins v. Moreno*, 435 U.S. 647, 662, 668-69 (1978). On February 21, 1979, the Maryland court held that G-4 aliens could be domiciled in Maryland under

common law principles (P.A. 137a, 156a). *Toll v. Moreno*, 284 Md. 425, 444, 397 A.2d 1009, 1019 (1979).[8]

Eight months before the latter decision, on June 23, 1978, the Board of Regents of the University of Maryland had adopted, and transmitted to this Court and the Court of Appeals of Maryland, "A Resolution Clarifying the Purposes, Meaning, and Application of the [In-State] Policy Insofar As It Denies In-State Status to Nonimmigrant Aliens" (P.A. 172a). The clarifying resolution reaffirmed the in-state policy; reiterated its rational bases, including the principle that the costs of a public college or university education should be equalized between various classes in measure to their contributions to the State's economy; and asserted that these rationales were served regardless of whether the policy "conforms with the generally or otherwise applicable definition of domicile under the Maryland common law" (P.A. 174a).

On April 30, 1979, this Court issued its second opinion, which stated in relevant part:

> Our decision in *Elkins* rests on the premise that "the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G-4 aliens were the Maryland courts to hold that G-4 aliens can" acquire such domicile. 435 U.S., at 661. After the clarifying resolution, this premise no longer appears to be true. And if domicile is not the "paramount" policy consideration of the University, this case is no longer "squarely within *Vlandis* as limited by *Salfi*." . . . *Id.*, at 660. The clarifying resolution thus raises new issues of constitutional law which should be addressed in the first instance by the District Court.

[8] Dr. John S. Toll, who became President of the University of Maryland on July 1, 1978, was substituted as a party for Dr. Elkins while the case was pending before the Court of Appeals of Maryland.

> We therefore vacate the judgment of the Court of Appeals and remand to the District Court for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978.

(P.A. 157a, 160a) *Toll v. Moreno*, 441 U.S. 458, 461-62 (1979).

C. Proceedings After Remand

Subsequently, the district court, again utilizing irrebuttable presumption analysis, held on October 31, 1979, that the University's in-state policy violated due process before June 23, 1978. Nevertheless, the court ruled that the identical policy, applied the same way, with identical results, did not create an unconstitutional irrebuttable presumption after the date of the clarifying resolution (P.A. 11a, 27a-28a). *Moreno v. Toll*, 480 F. Supp. 1116, 1125 (D. Md. 1979).[9] The court also concluded that the clarifying resolution, although it did not alter the language or operation of the in-state policy, was nevertheless a "change in that policy" that could not be given "retroactive effect" to deny the students their claim to refunds from the July 13, 1976, date of the court's initial order (P.A. 27a). *Moreno v. Toll*, 480 F. Supp. at 1124. The court requested proposed orders from counsel to effectuate these refunds, and the petitioners objected that a requirement of retroactive monetary relief would offend that eleventh amendment because the condition on which

[9] The district court reasoned that the Board of Regents' clarifying resolution took the policy out of the irrebuttable presumption mold because "[g]iven the University's definition of domicile, which by its terms excludes nonimmigrant aliens, it is universally true that G-4 aliens cannot qualify" (P.A. 28a). 480 F. Supp. at 1125. In its first opinion, the district court implicitly rejected a similar argument by the University that its definition on domicile could differ from the common law applications of domicile in other contexts (R. 241-47).

possible refunds had been premised in the stay orders had not been fulfilled (J.A. 42A).

On April 17, 1980, the district court further held that the in-state policy discriminated against nonimmigrant aliens and interfered with Congress' exclusive control over immigration (P.A. 29a, 44a, 46a-47a). *Moreno v. Toll*, 489 F. Supp. 658, 667, 668 (D. Md. 1980).[10] After additional correspondence and a conference with counsel, in which the petitioners reiterated their objections to retroactive monetary relief (J.A. 66A), the court issued an order on May 30, 1980, declaring the in-state policy unconstitutional on due process grounds before June 23, 1978, and unconstitutional on equal protection and supremacy clause grounds before, on, and after June 23, 1978 (P.A. 48a). In an attempt to circumvent the eleventh amendment problem, the court purported to reaffirm its order of July 13, 1976. In addition, retroactive monetary relief was ordered for a four year period, even though the policy had been declared constitutional on due process grounds for the period after June 1978 and was not invalidated on other constitutional grounds until April 1980. Immediately thereafter, Dr. Toll appealed from this order granting an injunction and sought and obtained a stay of the court's order (P.A. 52a).[11]

On March 26, 1981, in a per curiam opinion, the United States Court of Appeals for the Fourth Circuit affirmed

[10] However, the district court expressly rejected the students' contention that the in-state policy interfered with the tax exemption provisions of the banks' international agreements (P.A. 44a). Toll v. Moreno, 489 F. Supp. at 667.

[11] Although the University of Maryland had been dismissed as a party to the case in 1976, the judgment was entered "AGAINST DEFENDANTS" (P.A. 51a). Subsequently, the district court entered an amended judgment in favor of the University and against Dr. Toll, but the appeal had already been docketed. For this reason, the petitioners joined in an amended notice of appeal (J.A. 87A). *See* Fed. R. Civ. P. 60(a).

the decision of the district court (P.A. 1a). *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981). The appellate court essentially adopted the opinion of the lower court on the due process, equal protection, and supremacy clause issues and affirmed for "reasons sufficiently stated in the opinion[s] of the district court" (P.A. 5a, 6a). 645 F.2d at 220.

Thus, the decisions below expressly held that a classification disadvantaging nonimmigrant aliens is based upon alienage, affects a "suspect class," and must therefore be justified by a compelling interest (P.A. 5a). 654 F.2d at 220. In so doing, these courts held that the term "resident alien" in decisions of this Court included nonimmigrants as well as immigrants (P.A. 36a-37a), 489 F. Supp. at 663, rather than only those aliens who "are obligated to pay their full share of taxes," *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977), and who "may be called into the armed forces." *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

The decisions below did not mention the overwhelming number of aliens who qualify under the University's policy. The lower courts found "immaterial" that an effect of the policy was to deny in-state status to large numbers of *citizens*, specifically, out-of-staters and certain military personnel (P.A. 39a). 489 F. Supp. at 664. They refused to rely upon language in *Foley v. Connelie*, 435 U.S. 291 (1978), indicating that strict judicial scrutiny is applicable only to alienage classifications denying "necessities of life," and instead concluded that *Nyquist v. Mauclet*, a decision involving a state educational scheme pointedly disadvantaging permanent resident aliens — rather that nonimmigrants — governed their inquiry.

Finally, the lower courts declined to follow the view of the only two members of this Court who had previously spoken on the question and concluded that *Mauclet* was

not controlling in this case (P.A. 131a-32a n.6), *Elkins v. Moreno*, 435 U.S. 647, 677 n.6 (opinion of Rehnquist, J., joined by Burger, C.J., dissenting from certification), denigrating their remarks as "merely dicta in a dissenting opinion" (P.A. 41a n.13). 489 F. Supp. at 665 n.13.[12] Thus, they applied strict scrutiny equal protection anaylsis to the in-state policy and concluded that none of the justifications for the policy furthered a compelling interest, although some were or might be permissible under a rational basis inquiry (P.A. 42a-43a). 489 F. Supp. at 666. In short, they rejected the University's rationale that a class which avoids substantial payment of income taxes — the major state tax source of funds to operate the University — should not be entitled to in-state tuition rates.

On the supremacy clause issue, the lower courts found that the in-state policy automatically violated the supremacy clause because the policy had failed to pass muster under strict scrutiny equal protection analysis. They concluded that the policy interfered with Congress' exclusive control over immigration solely because they had found invidious discrimination without compelling justification (P.A. 46a-47a). 489 F. Supp. at 667-68.

On the due process issue the decisions below held that this Court's decision in *Toll v. Moreno* had not removed the irrebuttable presumption issue from the case for the period before June 23, 1978, the date of the Board of Regents' clarifying resolution. Instead, the lower courts held that before that date the in-state policy conclusively and unconstitutionally presumed that aliens could not acquire domicile so as to qualify for in-state benefits. Without comment, the lower courts passed over the University's contentions that the district court itself had actually decided in July 1976 that the in-state policy could not be rationally justified on the basis of cost equalization

[12] The majority opinion in Elkins v. Moreno also suggested that *Mauclet* did not automatically control the result in this case (P.A. 114a). 435 U.S. at 658.

or administrative convenience (P.A. 88a), 420 F. Supp. at 560, in misreliance upon *Vlandis v. Kline*, 412 U.S. 441 (1973).

Specifically addressing the refund question, the court of appeals held that the University had waived its eleventh amendment immunity by agreeing to pay refunds as a condition for obtaining a stay of the district court's order in 1976.[13] The appellate court refused to take note of the express limitation on the University's liability contained in the stay order, that is, that the district court order be "finally affirmed on appeal," rather than be vacated as occurred as a result of this Court's action in *Toll v. Moreno*, 441 U.S. 458 (1979).

On April 15, 1981 (and again on May 11 and June 9), the court of appeals stayed the issuance of its mandate pending the University's filing of a petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

The lower courts erroneously concluded that the University of Maryland's in-state policy for tuition and charge differentials violated equal protection by discriminating against a suspect class of nonimmigrant aliens, contravened the supremacy clause by attempting to regulate immigration, and prior to June 23, 1978, constituted an impermissible, irrebuttable presumption violative of due process. Over the University's objection that a refund of tuition violated the eleventh amendment and was contrary to the terms of the stay order entered by the district court,

[13] The district court resolved the refund issue in a different fashion. It construed the June 1978 clarifying resolution of the Board of Regents as a retroactive substantive policy change that could not be given effect to deprive the international bank students of their supposedly vested rights to refunds (P.A. 26a-27a). 480 F. Supp. 1124-25.

the lower court erroneously ordered the University to pay refunds to the international bank students, retroactive to July 13, 1976.

EQUAL PROTECTION—
INAPPLICABILITY OF STRICT SCRUTINY

The reason "strict scrutiny" applies to certain state classifications disadvantaging the "suspect class" of resident aliens is because that class bears many of the same burdens of citizenship such as payment of the full spectrum of taxes and service in the armed forces. *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Graham v. Richardson*, 403 U.S. 365, 376 (1971). Nonimmigrant aliens who do not bear such burdens are no "resident aliens." Particularly here, where in-state educational benefits, which are not a necessity of life, are made available to so many resident aliens and their denial to nonimmigrants is not inconsistent with any federal policy, the constitutionality of the University's in-state policy should be gauged under the "rational basis" equal protection standard. That policy is rationally based because it limits University expenditures by providing an in-state subsidy to those more likely to contribute to the economic well-being of the University and the State; equalizes the expenses of providing higher education between those who do and do not contribute to its cost by way of income tax revenues; and allows the University's in-state determination and appeals process to be administered efficiently.

SUPREMACY CLAUSE—
NO STATE REGULATION OF IMMIGRATION

A state policy does not constitute an impermissible attempt to regulate immigration if it disadvantages only nonimmigrants, rather than all aliens. This preemption doctrine has no application to the denial of a state benefit, like a tuition differential, which is not a necessity of life. Finally, where, as here, the state regulation is harmo-

nious with the federal scheme, a preemption challenge must fail. See *Foley v. Connelie*, 435 U.S. 291, 295 (1978); *DeCanas v. Bica*, 424 U.S. 351, 358 (1976).

DUE PROCESS— NO IRREBUTTABLE PRESUMPTION

If the University's in-state policy has a rational basis under the equal protection clause, it does not constitute an irrebuttable presumption violative of due process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976). Because the in-state policy is independently justified by rational bases other than mere administrative convenience, it is not invalid under *Vlandis v. Kline*, 412 U.S. 441, 451-52 & 456-59 (1973). *Toll v. Moreno*, 441 U.S. 458 (1979) removed the irrebuttable presumption issue from this case. Thus, the lower courts were not free to conclude that the University's in-state policy was invalid under the due process clause for any period of time. Finally, this Court's decisions have so undermined *Vlandis* that it should be formally overruled.

THE ELEVENTH AMENDMENT PROHIBITS RETROACTIVE TUITION REFUNDS

The district court's order of July 13, 1976, was effectively vacated by this Court's decision in *Toll*. A "reaffirmation" of that order four years later is prohibited by the eleventh amendment. To obtain a stay in the district court, the University consented to pay refunds only if the July 13, 1976, order was "finally affirmed on appeal" — a condition that can never occur in light of the decision in *Toll*.

ARGUMENT

I.

NONIMMIGRANT ALIENS ARE NOT A SUSPECT CLASS AND THE RATIONALLY-BASED DENIAL OF AN IN-STATE EDUCATIONAL SUBSIDY TO NONIMMIGRANTS DOES NOT TRIGGER STRICT SCRUTINY EQUAL PROTECTION ANALYSIS.

A. Inapplicability of Strict Scrutiny

Simply stated, the equal protection issue in this case is whether a state policy benefiting permanent resident aliens but disadvantaging nonimmigrant aliens in the receipt of an in-state educational subsidy that is not a necessity of life affects a "suspect class" and must be gauged by strict scrutiny rather than by a rational basis inquiry. The University has advanced only "rational bases" for the exclusion of nonimmigrants from in-state benefits, including the fact that as a general proposition members of the nonimmigrant class, either because of state income tax exemptions, other more favored state income tax treatment, or their limited stay in this country, do not make the same contribution to the cost of education at the University as citizens or permanent resident aliens. The lower courts effectively found that the University's in-state policy was rationally based, but insufficient to withstand the strict judicial scrutiny applicable to certain state classifications affecting aliens.

In every case in which this Court has applied the strict scrutiny standard of equal protection review to a state classification affecting aliens, the challenged statute or practice discriminated against permanent resident aliens. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971). In addition, "[t]he Court has taken pains in each of the recent cases to make clear that the plaintiffs were

resident aliens, and in explaining why alienage classifications are suspect, it has referred pointedly to the position of resident aliens." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312 n.140. This has caused one scholar to note:

> The Supreme Court . . . has not held it unconstitutional to discriminate against nonimmigrant aliens. It has not even suggested that such aliens are within the class protected under the suspect classification doctrine.

Rosberg, *The Protection of Aliens from Discriminatory Treatment by the Government*, 1977 Sup. Ct. Rev. at 312.[14]

Indicative of the lower courts' misreading of this Court's alienage decisions is their attempt to incorporate nonimmigrants within the meaning of the term, "resident alien." Admittedly, that term can mean different things depending upon the context, but clearly in the context of this Court's equal protection cases a resident alien is a permanent resident alien, not a nonimmigrant. In *Graham v. Richardson*, 403 U.S. 365, 376 (1971), this Court said that "[a]liens like citizens pay taxes and may be called into the armed forces. Unlike . . . short-term residents . . . aliens may live within a state for many years, work in the state and contribute to the economic growth of the state." *See also In re Griffiths*, 413 U.S. 717, 722 (1973). Similarly, in *Mauclet*, the majority noted that "[r]esident aliens are obligated to pay their *full share* of the taxes that support the assistance programs." 432 U.S. at 12 (emphasis added). Most nonimmigrants do not live within the State for many years or contribute significantly to its

[14] Professor Rosberg has said that "one has an intuitive sense that the denial of benefits to nonimmigrant aliens rests on a real difference between their position, on the one hand, and the position of both resident aliens and citizens on the other." Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312.

economy. Moreover, G-4 aliens, among other categories of nonimmigrants, are not subject to the full range of state taxes. Indeed, *all* nonimmigrants are treated differently than resident aliens for purposes of income taxation. Finally, nonimmigrants may not be drafted as long as they maintain their nonimmigrant status. 32 C.F.R. § 1611.2 (1980). Thus, it is clear that this Court has not been thinking of nonimmigrants when it has displayed its special solicitude for "resident aliens."[15] *See United States v. Tsuda Maru*, 479 F. Supp. 519, 521-22 (D. Alas. 1979), in which the court, after citing to a definition of "resident alien" that excluded nonimmigrants, cogently observed:

> The numerous cases which have struck down alienage classifications have all involved resident aliens. . . . These cases have often emphasized that resident aliens live in American communities, must obey our laws, pay taxes, serve in the armed forces, and have made significant contributions to our country. . . . It is the burdens which resident aliens bear along with citizens that make absolute bars to aliens qualifying for work and educational opportunities so irrational. Resident aliens are in many respects just like citizens, and classifications which disadvantage them will usually be subjected to strict judicial scrutiny. . . . The philosophical and legal support for the doctrine is completely absent when a case involves a non-resident alien.

[15] In fact, one commentator has drawn the following conclusion from the Court's prior handling of this case:

> The Court's restraint in *Elkins* was revealing. Had plaintiffs been resident aliens, the Court would not have hesitated to decide the case. Any definition of domicile designed to exclude *resident* aliens from state welfare or education benefits would clearly be unconstitutional under *Graham*. The Court's decision in *Elkins* implies that nonimmigrant aliens may be restricted by a state's definition of domicile and thus may not be entitled to the "heightened judicial solicitude" extended to resident aliens.

Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 Stan. L. Rev. 1069, 1083 (1979). *See also* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. at 312.

See also Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); *Matter of Anwo*, Interim Decision #2604 at 5-6 (BIA 1977), *aff'd sub nom. Anwo v. INS*, 607 F.2d 435 (D.C. Cir. 1979) (The lawful permanent resident "enjoys greater rights than the nonimmigrant alien and assumes commensurate responsibilities and duties"); *Wong v. Board to Trustees of California State Universities and Colleges*, 125 Cal. Rptr. 841. (Cal. App. 1975) (upholding the constitutionality of a California statute that denied in-state benefits to nonimmigrants).

Second, so many aliens are eligible for in-state status at the University that it is irrational to contend that the in-state policy denies its benefits on the basis of alienage. In 1978 and 1979 there were more than twice as many permanent resident alien undergraduate students at the University than there were nonimmigrants, and most of the permanent resident aliens qualified for the greater in-state subsidy (J.A. 53A-54A). And on the basis of alien address reports, there were seven times as many permanent resident aliens in the State of Maryland as there were nonimmigrants. *See supra* at 5 n.3. *See also* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 313 (A State's "willingness to treat resident aliens as well as it treats citizens strongly suggests that the classification did not arise out of ill will or a stereotyped view of aliens or a desire to exploit a weak minority by imposing burdens on them while giving them few benefits.").

Third, in-state tuition and fees are not "necessities of life." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 260 n.15 (1974). As noted by Chief Justice Burger for the majority in *Foley v. Connelie*, 435 U.S. 291, 295 (1978), all

of this Court's cases applying strict scrutiny to state alienage classifications have involved exclusions that "struck at the noncitizen's ability to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence." A dollar differential, not a right to education, is at stake here, an amount roughly equivalent to the amount of state income tax an international bank parent is spared by treaty each year.[16] Certainly no claim can be made that professional employees of the World Bank and the Inter-American Development Bank, with their generour array of salaries, fringe benefits (including the legal and other costs of this litigation) and dependency allowances (*see* Foreign Assistance and Related Programs Appropriation Bill, 1978, H.R. Rept. 95-417, 95th Cong., 1st Sess., at 46-47 (June 15, 1977)), are unable to pay the differential. More importantly, at least for employees at the World Bank, neither the students not their parents need to pay the differential at all, because the bank itself pays it in the form of a "tuition equalization subsidy."

Fourth, strict scrutiny is not applicable where, as here, it is unreasonable to impute to the Federal Government a policy against the University's in-state scheme and, in fact, the in-state policy is consistent with the purposes of federal immigration law.[17] Just like the University of

[16] Thus, the present case is vastly different than that presented in Nyquist v. Mauclet, 432 U.S. 1 (1977), where the resident alien scholarship applicants might legitimately make the claim that to deny them a scholarship was to deny them an education and where state law effectively proclaimed the right to a higher education a necessity of life.

[17] *See* Perry; *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1063-64 (1979) ("Some state alienage-based classifications are sustained and other struck down not really because all the former pass muster under a strict standard of review, whereas all the latter do not, but because only the former can be deemed consonant with implicit federal policy regarding aliens."). *See also* Comment, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 Yale L.J. 940, 959 (1980).

Maryland and other public colleges and universities across the nation, the Federal Government has drawn the line on various benefit schemes between nonimmigrants on one hand and citizens and permanent resident aliens on the other. *See, e.g.*, 42 U.S.C. § 1395(o) (1976) (Medicare benefits) (upheld in *Mathews v. Diaz*, 426 U.S. 67 (1976)); 45 C.F.R. § 177.201 (1980) (excluding nonimmigrant aliens from eligibility for federal, state, and private programs of low interest student loans).[18] This latter regulation makes it absolutely clear that the Federal Government has no policy in favor of according educational benefits to nonimmigrants — in fact, just the opposite. If anything, 45 C.F.R. § 177.201 reflects a purpose of the immigration laws to encourage a change of immigration status to permanent resident alien — a purpose with which the University's in-state policy is entirely consistent.

Finally, two members of this Court have already spoken to the applicable standard to gauge the classification at issue here. Justice Rehnquist, in a opinion joined by Chief Justice Burger, has said:

> Unlike the situation in *Nyquist* [v. Mauclet, 432 U.S. 1 (1977)], the University of Maryland does not discriminate against *resident* aliens. Cf. 432 U.S., at 2, 4, 5-6, and n.6 and 12. There thus would not appear to be any issue of suspect class and the University's in-state tuition policy need only be shown to be rationally related to a legitimate state interest. The University's concern with cost equalization alone

[18] In Mathews v. Diaz, 426 U.S. 67 (1976), this Court upheld the denial of Medicare benefits to nonimmigrants upon application of a rational basis equal protection standard. Although the holding in *Diaz* can be explained on the basis of the Federal Government's plenary control over immigration, the Court suggested in *dicta* that the reason state exclusion of aliens from benefits might not be justified is because the State invariably treated out-of-staters and aliens differently. 426 U.S. at 85. The University's in-state policy does not suffer from such a defect in that *both* out-of-staters and nonimmigrants are denied the benefit. *See supra* at 4-6.

> would seem sufficient to support the line drawn by the University. *See Starns v. Malkerson, supra* [401 U.S. 985 (1977)].

Elkins v. Moreno, 435 U.S. 647, 676 n.6 (1978) (opinion dissenting from certification of question of state law to the Court of Appeals of Maryland).

For all of these reasons, the University's in-state policy does not disadvantage a suspect class. As a result, it should be gauged under the rational basis equal protection standard.

B. Rational Bases for University's Policy

Under the rational basis equal protection test, it is the international bank students' burden to demonstrate that the University's in-state policy is wholly unrelated to a legitimate state end. *McGowan v. Maryland*, 366 U.S. 420, 426-27 (1961). If "the distinctions drawn have some basis in practical experience," *South Carolina v. Katzenbach*, 383 U.S. 301, 333 (1966), the students' attack must fail. Finally, it makes no difference which of the rational bases is primary or subordinate. *McGinnis v. Royster*, 410 U.S. 263, 276 (1973). And "it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979). *See also Mathews v. Diaz*, 426 U.S. 67, 83-84 (1976). In this case, the presumption of constitutionality which must be accorded the University's policy stands because the challenged classification, "judged by reference to characteristics typical of the affected classes," *Califano v. Jobst*, 434 U.S. 47, 55 (1977), has "some basis in practical experience."

As Professor Rosberg has observed:

> [Nonimmigrants] do not share all the burdens that are imposed on residents of the country. In many respects their position is similar to that of nonresident citizens who are temporarily present in the state. *It may be perfectly rational to deny them benefits that are made available to the state's permanent residents.*

G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 S. Ct. Rev. 275, 312, 313 (emphasis added).

The University's out-of-state treatment of nonimmigrants is rationally based because it serves legitimate state interests in limiting University expenditures by providing an in-state subsidy to those more likely to contribute to the economic well-being of the University and the State — equalizing the expenses of providing higher education between those who do and those who do not contribute to its cost by way of income tax revenues; and efficiently administering the University's in-state determination and appeals process. *See* Affidavit of Wayne Sigler, ¶7 (J.A. 54A).[19]

Integral to weighing the first two rationales is an understanding of the characteristics and income tax treatment of nonimmigrants and the manner in which the University of Maryland acquires the funds necessary to furnish an education for its students.

[19] If, contrary to the in-state policy and the holding of the lower courts, the class of nonimmigrants is redefined as the students urge to encompass those nonimmigrants who can or cannot be domiciled in Maryland, a fourth interest surfaces in support of the University's policy — the prevention of disparate and unequal treatment between classes of nonimmigrants. *See* Knebel v. Hein, 429 U.S. 228, 295 (1977). In short, the University would have a legitimate interest in not fashioning a costly special rule for some already privileged members of the affected class. *See* New York City Transit Authority v. Beazer, 440 U.S. 568, 590 (1979).

Much has already been said the general characteristics of nonimmigrants. Many, such as temporary visitors, are here only briefly.[20] Others are in this country for a limited time. G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 S. Ct. Rev. 275, 312. In either case, these categories of nonimmigrants could hardly be expected to be around long enough to contribute financially to the University or the State's economy.

As a class, nonimmigrants are denied certain rights accorded citizens and permanent resident aliens, *e.g.*, federal student loans and education benefits, 45 C.F.R. § 177.201. Conversely, they are relieved of many of the burdens and responsibilities shouldered by citizens and permanent resident aliens, *e.g.*, the possibility of required military service, 32 C.F.R. § 1611.2.[21]

Most importantly, all nonimmigrants are treated differently and, in fact, more advantageously than citizens and permanent resident aliens, with respect to federal and state income taxation. Under 26 U.S.C. § 872 and Md. Ann. Code art. 81, § 280(a) (which adopts federal tax law), many nonimmigrants are exempt from taxation on their worldwide income. Other categories and members of the class of nonimmigrants are expressly exempt from

[20] According to the *1977 Annual Report: Immigration and Naturalization Service*, 8,036,916 nonimmigrants were admitted to the United States in fiscal 1977; the great majority of these were temporary visitors for pleasure or business. *Id.* at 4. In the same year, 5,263,966 aliens departed the United States and the great majority of these were obviously nonimmigrants. *Id.* at 34. On the other hand, on the basis of alien address reports, there were 4,451,306 permanent resident aliens in the United States as of fiscal year 1977. *Id.* at 106. Only 462,315 permanent resident aliens were admitted to the United States in fiscal year 1977. *Id.* at 5.

[21] Thus, nonimmigrants are not saddled with the disabilities associated with a suspect class. *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973).

state and federal income taxation. For example, students (holding an "F" visa) from some foreign countries are exempt by treaty from income tax on a portion of their earnings. *See, e.g.*, 19 U.S.T. 5280, 5304-05 (1967) (France); 23 U.S.T. 967, 999-1002 (1971) (Japan); 10 U.S.T. 984, 991-92 (1957) (Pakistan).

A number of diplomats and employees of international organizations (including the fathers of the student-respondents) are exempt by treaty from both federal and state income taxation on their salaries. *See, e.g.*, Art. X of the Income Tax Convention between the United States and the United Kingdom, 60 Stat. 1383; and Art. IX, § 9(b) of the Articles of Agreement of the International Monetary Fund, 60 Stat. 144; 61 *Opinions of the Attorney General of Maryland* 840 (1976) (World Bank employees exempt from Maryland income tax on their salaries). Compensation of employees of international organizations not exempt from taxation by treaty are exempt from federal income taxation under 26 U.S.C. § 893 and, by operation of Md. Ann. Code art. 81, § 280(a) (taxable net income on state returns equals federal adjusted gross income), may be exempt from state income taxation. Internal Revenue Service regulations implementing section 893 provide that international organization employees who seek to adjust their immigration status to that of a permanent resident alien must execute and file a waiver with the Attorney General, which results in the waiver of that statutory tax exemption. I.R.S. Reg. § 1.893. This adjustment, of course, would result in the waiver of any state income tax exemption to which such employees may have been entitled. On the other hand, IRS regulations do not require the surrender of an international organization employee's tax exemption upon adjustment of immigration status to permanent resident alien if the exemption is dependent upon a treaty. *Id.* Employees of only a few international organizations, such

as the World Bank and the Inter-American Development Bank, fall into this category.[22]

In summary, regardless of particular provisions of law an individual nonimmigrant could point to as the source of his preferential income tax advantage, all nonimmigrants are treated differently than citizens and permanent resident aliens. Like those who are not here long enough to contribute to the State's economy, they do not fully support the State or the University with income tax payments. And it is undisputed that state income tax payments are the major tax source of revenue for the operation of the University of Maryland.[23]

[22] There are 42 international organizations entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organization Immunities Act. 22 U.S.C. § 288-288d. They are listed in the historical note to 22 U.S.C. § 288. Of that number, the following organizations have treaty tax exemptions for salaries of their officers or employees. Inter-American Development Bank; International Bank for Reconstruction and Development, International Centre for Settlement of Investment Disputes; International Coffee Organization; International Court of Justice; International Development Association; International Finance Corporation; International Monetary Fund; North Atlantic Treaty Organization; United Nations Organization. *See* CCH Standard Federal Tax Reporter ¶4196.095. Thus, 31, or approximately three-quarters of the international organizations whose employees hold G-4 visa status are not covered by tax treaties and their employees lose their tax exemptions upon adjusting their immigration status to permanent resident alien. Thus, the income tax and immigration adjustment status of the fathers of the student-respondents is not even reflective of the situation of most G-4 visa holders — the subclass the students represent.

[23] Tuition and fee charges do not pay the full cost of a university education. The University of Maryland is principally supported by general state funds, special funds and federal funds. The largest of these is general fund revenues. In fiscal year 1981, the University of Maryland received a general fund appropriation of $164 million. State of Maryland, *Budget Message to the General Assembly and the Budget in Brief* (Jan. 21, 1981) at 30. Total general fund revenues for the State exceeded $2.6 billion, nearly half of which was provided by the state income tax. *Id.* at 14 & 21. State and local property taxes do not enter the general funds of the State. *Id.* at 14.

The University's requirement that nonresidents and nonimmigrants pay out-of-state rates bears a rational relationship to the State's purpose of financing, operating, and maintaining the University of Maryland. In addition, the University's in-state policy is a rational attempt to achieve cost equalization between those who have and those who have not recently contributed to the State's economy through employment, tax payments, and expenditures, *viz.*, nonimmigrants and other nonresidents. *See Starns v. Malkerson*, 401 U.S. 985 (1971). Over the long term, it is reasonable for the State to conclude that permanent resident aliens might contribute more to the cost of a university education and its economic well-being than nonimmigrants, especially in light of the undeniable fact that an adjustment of immigration status to that of permanent resident alien is necessary for nonimmigrants to remain in this country permanently. In *Graham v. Richardson*, 403 U.S. 365, 376 (1971), this Court said that a State could not limit expenditures with respect to "tax revenues to which aliens have contributed on an *equal* basis with residents of the State." And, in *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977), the Court said that a State could not deny necessary benefits to resident aliens, who "are obligated to pay their full share of the taxes that support the assistance programs." But where nonresident aliens have not contributed on an equal basis to tax revenues and have not paid their full share of taxes that support educational programs, a rational basis of limiting expenditures is permissible under the equal protection clause.[24]

[24] In addition to cost equalization and limitation of expenditures, the University relies upon administrative convenience as a third justification for the in-state policy's treatment of nonimmigrants, particularly the administrative difficulties presented by individualized hearings for the University's large nonimmigrant student population. At the College Park undergraduate campus of the University of Maryland, 17 staff members devote a substantial portion of their time to administering the in-state determination and appeal process at an

II.

THE DENIAL OF AN IN-STATE SUBSIDY TO NONIMMIGRANTS DOES NOT CONSTITUTE STATE REGULATION OF IMMIGRATION PROHIBITED BY THE SUPREMACY CLAUSE.

In *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 605-06 (1976), this Court noted:

> We do not suggest . . . that a State . . . may not be permitted some discretion in determining . . . whether aliens may receive public benefits. . . .

And in *DeCanas v. Bica*, 424 U.S. 351, 355 (1976), the Court stated:

> [We have] never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised . . . . [S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.

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estimated cost of more than $100,000 annually. Affidavit of Wayne Sigler, ¶7 (J.A. 54A). More than 700 petitions for in-state classification are filed annually. *Id.* If individualized hearings on additional domiciliary indicia were given to nonimmigrants, the cost of administering the system would undoubtedly increase. But the University's policy of limiting in-state classification hearings for nonimmigrants to the "objective criterion" of changes in their immigration status reduces the need for and burden and expense of long, complicated hearings (many of which may require interpreters) with respect to other domiciliary indicia. Affidavit of Wayne Sigler, ¶8 (J.A. 54A). The University's policy promotes efficiency and reduces costs so that funds may be better spent on educational needs, by requiring full-scale hearings on domiciliary indicia only when a G-4 alien or other nonimmigrant student has adjusted his immigration status.

Under these principles the question of how a public university determines eligibility for preferential tuition benefits falls into permissible regulation.

In *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), this Court said that a state statute which prohibited an alien from earning a livelihood so burdened the entrance or residence of aliens as to amount to a regulation of immigration. For the same reason, the Court in *Graham v. Richardson*, 403 U.S. 365 (1971), struck down stringent state residency requirements denying to resident aliens welfare benefits that were essential to life, literally forcing them out of the country. Chief Justice Burger summarized the principle of these cases in *Foley v. Connelie*, 435 U.S. 291, 295 (1978) (emphasis added):

> These exclusions struck at the noncitizen's *ability to exist* in the community, a position seemingly inconsistent with the congressional determination *to admit the alien to permanent residence.*

This preemption doctrine has never been applied to an enactment which disadvantaged only nonimmigrants (rather than all aliens). Moreover, the doctrine has no application to the denial by a State of a benefit that, like a tuition differential, is not a necessity of life. Finally, where, as here, the state regulation is harmonious with the federal scheme, a preemption challenge must fail. *DeCanas v. Bica*, 424 U.S. 351, 358 (1976).[25]

In the present case, the decisions below disregarded these principles to fashion a rule automatically invalidating on supremacy clause grounds every asserted discrim-

[25] The Federal Government presently denies its educational benefits to G-4's and other nonimmigrants. *See* 45 C.F.R. § 177.201. In addition, it should be noted that employees of most international organizations derive their income tax advantage from federal law, 26 U.S.C. § 893 (1976), and are required to waive their tax exemption upon adjustment of immigration status. The rationale of the University's in-state policy is entirely consistent with this federal policy.

ination against an alien subclass. First, the rule of the lower courts is analytically unsound. It suggests that a supremacy clause violation can be justified upon the showing of a compelling interest (P.A. 47a). 489 F. Supp. at 668. This is absolutely false. *See Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84, 93 (1963). Moreover, such a per se rule refuses to recognize that this Court on Occasion has sustained far-reaching discrimination against aliens without a suggestion that the supremacy clause was implicated. *See Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978); *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed*, 430 U.S. 961 (1977).

Finally, the lower courts ignored the rule of *DeCanas v. Bica*, 424 U.S. 351, 355-56 (1976), that "even if . . . local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration. . . ." The University's in-state policy, like those of most public colleges and universities, has absolutely no impact on immigration and thus does not violate the supremacy clause.[28]

[28] The students argued in the district court that the cost equalization rationale of the University's in-state policy conflicted with the rationale behind the international agreements, which preclude federal and state taxation of salaries paid to employees of the international organizations. The lower court rejected this contention, holding that the purported conflict between two rationales was "too attenuated to warrant invalidating the University's policy" (P.A. 45a). 489 F. Supp. at 667.

III.

THE LOWER COURT REFUSED TO GIVE EFFECT TO THE DECISION IN *TOLL v. MORENO*, 441 U.S. 458 (1979), EMBRACED A CONSTITUTIONAL DOCTRINE DISFAVORED BY THIS COURT, AND ERRONEOUSLY CONCLUDED THAT THE UNIVERSITY'S IN-STATE POLICY CREATED AN IRREBUTTABLE PRESUMPTION VIOLATIVE OF DUE PROCESS PRIOR TO JUNE 1978.

It is clear that ever since *Weinberger v. Salfi*, 422 U.S. 749 (1975), the irrebuttable presumption doctrine of *Vlandis v. Kline*, 412 U.S. 441 (1973), has been disfavored by this Court and will not be used to invalidate rationally based governmental policies. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 592 n.38 (1979); *Vance v. Bradley*, 440 U.S. 93 (1979); *Friedman v. Rogers*, 440 U.S. 1, 7 n.8 (1979); *First National Bank v. Bellotti*, 435 U.S. 765, 772-74 (1978); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 490 n.18 (1977); *Skafte v. Rorex*, 430 U.S. 961 (1977) (*mem.*); *Fiallo v. Bell*, 430 U.S. 787, 791 (1977); *Knebel v. Hein*, 429 U.S. 288, 297 (1977); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24 (1976); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Although the University fully supports the position of the amici curiae that *Vlandis* is no longer good law and should be formally overruled, there are at least three theories under which this Court could reject the lower court's irrebuttable presumption holding without overruling the 1973 decision.

First, as this Court has done in the past, it could conclude that if the University's in-state policy is constitutional under the equal protection clause its operation is clearly permissible under the due process clause. *See New York Transit Authority v. Beazer*, 440 U.S. 568, 592 n.38 (1979); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976); *Trafelet v. Thompson*, 594 F.2d 623, 630 (7th Cir. 1979), *cert. denied*, 444 U.S. 906 (1979) ("Other courts have uniformly treated the doctrine of irrebuttable pre-

sumptions as coextensive with the equal protection clause.").[37]

Second, this Court could limit *Vlandis* to its precise circumstances, *viz.*, where the only rational basis for an otherwise irrational scheme was a state interest in administrative convenience. *See Vlandis v. Kline*, 412 U.S. 441 451-52 (1973). *See also* concurring opinion of Justice White. *Id.* at 456-59. Thus, *Vlandis* would not invalidate a state residency regulation justified by an interest other than mere administrative certainty. *See Sosna v. Iowa*, 419 U.S. 393, 409 (1975) (*Vlandis* does not invalidate "reasonable" residency requirements). Here, the University's in-state policy is independently supported by the cost equalization and limitation of expenditures rationales, and thus there is no unconstitutional irrebuttable presumption as found in *Vlandis*.

Third, this Court could find that the district court misconceived its mandate after the decision in *Toll v. Moreno*, 441 U.S. 458 (1979); that the irrebuttable presumption issue had been disposed of; and that it was free only to consider whether the University's policy violated equal protection and the supremacy clause.

In *Toll*, this Court indicated that the June 1978 clarifying resolution clearly setting forth the reasons for the University's denial of in-state benefits to nonimmigrants meant that the case was no longer "squarely within *Vlandis* as limited by Salfi," 441 U.S. at 461-62; or, in other words, there was no irrebuttable presumption. The case was remanded for consideration of "new issues" of

[37] Under the equal protection clause, it would make no difference whether the University's proffered rational bases were the "paramount" policy consideration in denying in-state status to nonimmigrants. *See* McGinnis v. Royster, 410 U.S. 263, 276 (1973). Any "conceivable" rational basis would justify the policy from its inception. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

constitutional law, *id.* 462, *viz.*, the equal protection and supremacy clause questions (*see Elkins v. Moreno* (P.A. 114a & 114a n.7), 435 U.S. at 658 and 658 n.7), not the due process question originally presented to this Court. There was no hint that the lower court was to sift through the record to determine whether the University's policy constituted an irrebuttable presumption at some earlier point in time.

Moreover, the reason given for the Court's action in *Toll* — that *Vlandis v. Kline* was inapplicable and that therefore the Court need not consider the question of overruling *Vlandis* as modified by *Weinberger v. Salfi* (P.A. 160a), *Toll v. Moreno,* 441 U.S. at 461-62 — makes it clear that this Court believed that for these parties, and as far as the entire case was concerned, the issue had been obviated. Obviously, if the Court thought that *Vlandis* still governed any of the rights and obligations of the parties in this case, it would have done what it said it would do, that is, consider the question of whether *Vlandis* as modified by *Salfi* should be "overrule[d] or further limit[ed]" (P.A. 116a). *Elkins v. Moreno,* 435 U.S. at 660.

In short, this Court's conclusion that *Vlandis* is inapplicable to this litigation and that no irrebuttable presumption exists was the law of the case and not subject to reexamination by the lower courts. *See Venido Co. v. Lektro-Vend Corp.,* 434 U.S. 425, 427-28 (1978) (when a case has been once decided by the Supreme Court on appeal, and remanded to the lower court, "whatever was before the Supreme Court, and disposed of by its decree, is considered as finally settled").

In addition, the lower courts' bifurcated result on the due process question, based on the June 23, 1978, clarifying resolution, demonstrates the analytical bankruptcy of the irrebuttable presumption doctrine. That resolution merely reiterated "rational bases" for the

in-state policy argued previously and asserted a cost-equalization rationale present in the record in the district court and in pre-litigation statements of University officials. It did not change the language, operation, or effect of the in-state policy, which denied in-state benefits to nonimmigrants before June 1978, and did so afterwards.

For all of these reasons, the lower courts' conclusion that the pre-June 23, 1978, in-state policy violates the due process clause should be reversed, and *Vlandis v. Kline* should be overruled.

IV.

THE LOWER COURTS' ORDERING OF RETROACTIVE TUITION REFUNDS VIOLATES THE ELEVENTH AMENDMENT.

It is apparent that the district court on remand from this Court went out of its way to decide the irrebuttable presumption question for the 1976-78 period, to construe the June 28, 1978, clarifying resolution as a retroactive substantive policy change, and to reaffirm its July 1976 order solely to enable the international bank students to claim refunds of in-state tuition from the State of Maryland. However, the district court's handling of the refund issue, as well as its endorsement by the Fourth Circuit, cannot be squared with the terms of the August 1976 stay order, the eleventh amendment to the Constitution, or common sense.

First, the July 13, 1976, district court order was effectively vacated when this Court vacated the judgment of the court of appeals on April 30, 1979. Moreover, as a legal and practical matter, the old district court order could not exist at the same time as that court was assuming jurisdiction to decide again the irrebuttable presumption issue. *See Duke Power Co. v. Greenwood County*, 299 U.S. 259, 268 (1936) (appellate court could not leave in effective operation the final decree of the district court and at the same time reinvest that court with

jurisdiction to retry the case). At that point, the old order was a nullity and the University's in-state policy was presumably (and in the petitioners' view, in fact) constitutional. By entering a new order in 1980 reaffirming the 1976 order and expressly mandating retroactive refunds, the lower court was obviously trying to circumvent the eleventh amendment's ban on the award of monetary relief against the State. *See Edelman v. Jordan*, 415 U.S. 651 (1974); *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977). See letters from counsel transmitting proposed orders (J.A. 41A, 42A & 65A-67A).

Second, the lower courts compounded their error and the violation of the State's eleventh amendment rights by ordering retroactive monetary relief for the post-June 23, 1978, period, even though the in-state policy had been declared constitutional on due process grounds after that date (P.A. 28a), 480 F. Supp. at 1125, and was not declared unconstitutional on different grounds until May 30, 1980. Although styled a reaffirmation of the 1976 order, the May 30, 1980, order for the first time required relief on the basis of two issues not decided until 1980 (one of which — the supremacy clause question — had not even appeared in the initial complaint.)

Third, although the University was willing to make refunds as a condition of obtaining the stay of August 3, 1976, this can be regarded as a waiver of eleventh amendment immunity *only* to the extent indicated, *i.e.*, refunds would be made if "the Court's Order of July 13, 1976, were finally affirmed on appeal" (P.A. 100a). *See Edelman v. Jordan*, 415 U.S. at 673 ("In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1908).").

Clearly, the terms under which refunds would be available under the stay order were not met. The University was successful in this Court and the judgment of the court of appeals and the 1976 order were vacated. In fact, the 1976 order has never been — and never can be — "finally affirmed on appeal." Moreover, the University's understanding of the terms of the 1976 stay is consistent with the view the court of appeals took in 1977 when it stayed its mandate pending the University's filing of a petition for certiorari. That stay order was entered "on the same terms as the district court originally granted its stay namely that should the appellant's petition for writ of certiorari prove unsuccessful" refunds would be available to eligible students (P.A. 104a). It is apparent that in light of the history of the *Moreno* litigation and the plain language of the stay order, the University has not waived its eleventh amendment immunity.

CONCLUSION

In summary, the lower courts impermissibly over-extended the suspect class equal protection analysis and the state regulation of immigration doctrine beyond any decision of this Court and erroneously decided the due process and eleventh amendment issues to make the University pay a price for a rationally based in-state policy. For all of these reasons, the decision of the circuit court affirming the district's injunction of May 30, 1980, and judgments of May 30, 1980, and June 24, 1980, should be reversed and *Vlandis v. Kline* should be overruled.

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